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No. 82-242

In the Supreme Court of the United States

OCTOBER TERM, 1982

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the court below properly construed Clean Air Act Section 307(f), 42 U.S.C. Section 7607(f) by awarding attorneys fees to respondents under the circumstances of this case, even though they did not prevail on the merits.

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STATEMENT

In general, the Sierra Club agrees with the facts as presented in the government's petition. But the statement fails to put into proper context the nature of the underlying litigation, *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). The extraordinary length and level of detail of the opinion shows that the issues were substantial and the case was very close. The court reached its decision only "... after interminable record searching (and considerable soul searching)." 657 F.2d at 410. It agreed with two of the Sierra Club's major contentions—that dry scrubbing technology was not adequately demonstrated and did not provide a proper justification for EPA's action (657 F.2d at

341, note 157, 351); and that the procedural history of the adoption of the standard was improper. 657 F.2d at 356.

Nonetheless, the court below felt constrained to uphold EPA's decision for two principle reasons. First, Clean Air Act section 307(d)(8) (42 U.S.C. section 7607(d)(8)) provides an unusually strict standard of judicial review:

> In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such error had not been made.

See, *e.g.*, 657 F.2d at 353, 391-92, 396. Second, the Court of Appeals heeded this court's admonition in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) against ". . . [I]mposing its own notions of proper procedures upon an administrative agency entrusted with substantive functions by Congress." 657 F.2d at 391-92.

In short, while the Court of Appeals found many of the Sierra Club's criticisms of EPA's action to be justified, those errors were not of sufficient magnitude to require reversal. Nonetheless, by pointing them out to the court and the agency, the Sierra Club "aided agency implementation" of the Clean Air Act, (672 F.2d at 37) by instructing EPA on a better (albeit not mandatory) way to conduct rule-makings concerning the role of emerging technology on air pollution standards.

The litigation also aided the implementation of the Clean Air Act by evoking a judicial determination on the permissible scope and limits of the use of macro-economic computer modeling and econometric forecasting in EPA's decision-making process. The Court of Appeals noted: "our

ruling on this question will inevitably affect agency procedures in a number of substantive contexts." 672 F.2d at 40. The Court of Appeals established several "safety valves" which an agency must observe in the process of econometric modeling: public exposure of the assumptions and data put into the model; acceptance and consideration of public comment; admission of uncertainties; and ". . . the insistence that ultimate responsibility for the policy decisions remains with the agency rather than the computer." 657 F.2d at 33.

Finally, the government's statement neglects to point out that the Court of Appeals also turned aside a challenge by industry to the effect that a 90% reduction in sulfur dioxide emissions is not technologically feasible. The court below specifically acknowledged the Sierra Club's contribution to the successful resolution of this issue, which "... would have been far less completely aired without Sierra Club's participation." 672 F.2d at 41. The opinion also noted that ". . . [T]he agency's response to several challenges asserted by the utilities was effectively supplemented by the efforts of the environmental groups." 672 F.2d at 36.

REASONS FOR DENYING THE PETITION

Under Rule 17 of this Court's rules, certiorari "is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Rules 17(a) through (c) set forth two basic reasons for granting the petition—a conflict in judicial decisions or the existence of an important question of federal law "which has not been, but should be, settled by this Court . . ." As we show below, neither of these criteria are satisfied here. While the policy of permitting attorneys fees to losing parties in certain limited cases *does* constitute an important legislative departure from past times, it is *not* a matter which needs to be settled by this court. Congress has

already spoken to the issues in a clear and unambiguous way. Plainly, the Court of Appeals interpreted the statute correctly; there is no call for this court to exercise its supervisory functions in this case. (See Point 1) Furthermore, judicial construction of the fees provision of the Clean Air Act and similar statutes has consistently and unanimously agreed with the court below. (See Point 2)

1. *Congress intended to give courts discretion to award fees to non-prevailing parties under Clean Air Act § 307(f) in appropriate cases.* Both the statutory language and the legislative history unambiguously support the Court of Appeals' interpretation of section 307(f). That section states in pertinent part:

> In any judicial proceeding under this section the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

The court below noted, "on its face, the statutory provision clearly permits the court to award attorneys fees to prevailing, substantially prevailing, or non-prevailing parties in 'appropriate' cases." 672 F.2d at 34.

The legislative history of section 307(f) is crystal clear. The House Report states:

> In the case of section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party." In fact, such an amendment was expressly rejected by the committee, largely

> on the grounds set forth in *NRDC v. EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973). H. Rep. No. 95-294, 95th Cong., 1st Sess., p. 337 (1977).

The key language from the *NRDC* case cited by the House Report is as follows:

> We are at liberty to consider not merely "who won" but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and unchartered dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service.

The opinion below pointed out that in the 1977 amendment "Congress made a clear choice between two different attorneys fees provisions . . .", rejecting a proposal calling for fees only to prevailing or partially prevailing parties in favor of the "far broader policy" of § 307(f) as enacted, allowing fees to *any* party whenever they are found to be "appropriate". See 672 F.2d at 35, note 3 citing A Legislative History of the Clean Air Act Amendment of 1977, 3644, 3817 (1978).

The government argues (Petition, p. 9) that "mere judicial 'interpretation' " of the Clean Air Act was not a benefit which Congress intended to reward with fees. But the *NRDC* case cited in the House Report and discussed above specifically noted that "early interpretation" of "novel and complex" portions of the Clean Air Act is "desirable". *NRDC v. EPA*, 384 F.2d at 1338. As the Court below concluded:

> This legislative history makes it difficult to escape the conclusion that the statutory goals of the Clean Air Act can be furthered by parties who make a substantial contribution to the interpretation and development of the Act, [citation], as well as by substantially prevailing parties and parties who win a favorable result other than by receiving a favorable verdict. 672 F.2d at 35, note 3.

Confronted with substantial and unambiguous evidence that Congress meant to allow fees to be awarded to non-prevailing parties, the government invites this court to reconstruct that history on the basis of its peculiar reading of the legislative history of *another* section of the Clean Air Act, enacted seven years earlier. Similarly, the government suggests that this Court adopt its debatable interpretation of the holding and import of the *NRDC* case in place of the reading given by Congress. Neither of these efforts to rewrite the clear legislative history is entitled to credence.

The government maintains that the meaning of Clean Air Act section 307(f) (added in 1977) "can only be determined by tracing its origins in the Clean Air Act of 1970." Petition, p. 16. The petition then discusses the history of § 304(d) of the Clean Air Act, 42 U.S.C. section 7604(d), added in 1970, which provides for fees in "citizen suits" brought in the district courts. The government points to two purposes of § 304(d), as reflected in the Senate Report—to discourage frivolous litigation and to encourage citizens to bring "legitimate actions", including those "which result in succesful abatement, but do not reach a verdict." S. Rep. No. 91-1196, 91st Cong., 2nd Sess, 36-37, 38-39 (1970). The government argues that the Senate Report, given a "careful reading", equates "legitimate actions" with "succesful actions", because the Report refers to only a single type of "legitimate action", one in which abatement occurs before judgment is obtained. See Petition, pp. 16-19.

The court below dealt with this argument as follows:

> While the only example of a non-prevailing party awarded attorneys' fees expressly cited in the Report is one where the case was mooted by abatement, we do not read the Report as ruling out all other instances where attorneys' fees would be appropriate. And, in any case, we cannot disregard the clear legislative history *specific* to section 307 [discussed above] . . . That history shows that Congress in 1977 specifically adopted the far broader policy of awarding substantial contributions to the statutory goals of the Act. 672 F.2d at 35, note 3.

The government (Petition, p. 24) disagrees, arguing that section 307(f) was enacted for a "narrow purpose", merely to "conform" section 307 with section 304(d). The Senate Report does, undoubtedly, indicate a desire to allow fees under section 307, as well as section 304. But that was not the only purpose of the 1977 legislation. As noted above, the House Report sets forth another goal: ". . . to encourage litigation which will assure proper implementation and administration of the Act or otherwise serve the public interest." To that end, the House Committee specifically stated that non-prevailing parties could get fees when appropriate, and endorsed the language to that effect in *NRDC v. EPA*, *supra*. See H. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977). A subsidiary purpose was to "meet the requirement for specific authorization imposed by 28 U.S.C. § 2412 and by the Supreme Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

As the Conference Report noted, both the House and Senate version of the fees provision under section 307 were adopted in conference. H. Rep. No. 95-564, 95th Cong., 1st Sess., p. 177 (1977). Thus, it is an inaccurate and misleading interpretation of the legislative history to contend that

the sole objective of the 1977 Amendment to § 307 was to conform it to the supposedly limited scope of section 304(d). The 1977 Senate Report reveals no such restrictive purpose and the House Report clearly shows that Congress intended to do far more than merely extend the provisions of § 304(d) to actions under § 307—instead, it reacted to more recent developments, endorsing the rationale of the *NRDC* opinion.

In any event, Congress intended to allow fees to non-prevailing parties under Section 304(d). Sen. Spong, a prominent supporter of the 1970 Clean Air Act amendments, remarked during debate on section 304(d): "The courts are given discretionary authority to award costs, including reasonable attorney and witness fees to any party." Senate Consideration of the Report of the Conference Committee, December 18, 1970, reprinted in "A Legislative History of the Clean Air Act Amendments of 1970", 93rd Cong., 2nd Sess., volume 1, p. 147 (1974).

The courts, too have unanimously construed section 304(d) to allow fees to non-prevailing parties. See, *e.g., Natural Resources Defense Council v. EPA, supra,* 484 F.2d 1331, 1338 (1st Cir. 1973); *Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co.,* 62 F.R.D. 353, 355 (D. Del. 1974); *Citizens Association of Georgetown v. Washington,* 383 F.Supp. 136 (D.D.C. 1974), *reversed on other grounds,* 535 F.2d 1318 (D.C. Cir. 1976); *Metropolitan Washington Coalition for Clean Air v. District of Columbia,* 639 F.2d 802 (D.C. Cir. 1981). In summary, even if one accepts the dubious argument that Congress meant section 307(f) to do no more than track section 304(d), the courts would still have discretion to award fees to non-prevailing parties.

A recent legislative development reenforces the construction of § 307(f) by the Court of Appeals. During a

mark-up session on amendments to the Clean Air Act before the Senate Environment Committee on August 19, 1982, Sen. Simpson offered an amendment which would limit fee awards to prevailing parties. The Committee voted to adopt the proposed amendment. The relevant portion of the hearing transcript is attached as Appendix A. Obviously, Senator Simpson's proposal would have been unnecessary if, as the government contends, existing law already denied fees to non-prevailing parties.

The government argues that a party must prevail on at least some issues in order to be entitled to an award under section 307(f) (Petition, pp. 25-26). It maintains that a "close reading" of *Natural Resources Defense Council v. EPA, supra,* supports that conclusion, noting that the petitioners in *NRDC* were actually successful on some issues. Thus, it is argued, the court's actual holding was that fees would be paid only on successful issues. But the court did not indicate that fees should be withheld on the losing issues. The opinion stated: "But the challenges here, *even those not sustained,* were mainly constructive and reasonable." 484 F.2d at 1338 (Emphasis supplied). Thus, both the language and the holding of the *NRDC* case support the principle that fees may be awarded on losing issues.

The government (Petition, pp. 13-14) contends that the statute should be construed so as to be consistent with "certain fundamental considerations underlying the doctrine of sovereign immunity and the traditional rules governing the allocation of attorneys' fees." This contention is difficult to take seriously, in view of the government's concession that the legislative history "... clearly demonstrates that Congress meant to waive the government's traditional immunity and to overcome the presumption of the 'American Rule' against fee shifting." (Petition, p. 15). As noted above, the legislative history states specifically that section 307(f)

was intended to meet the requirements of the *Alyeska* case to waive sovereign immunity and the "American Rule" by means of specific legislative reference.

2. *The courts have unanimously supported the decision below.* Statutes such as Clean Air Act § 307(f), which permit a court to award fees to any party when "appropriate", have consistently and without exception been construed by the courts to permit the award of fees to losing parties. Those decisions are discussed in the opinion below at 672 F.2d 36-38. The first such case was *Natural Resources Defense Council v. EPA,* 484 F.2d 1331 (1st Cir. 1973) which, as noted above, was endorsed by the House Committee which drafted § 307(f). A year later, the district court for Delaware construed Clean Air Act section 304(d), concluding that "ultimate success in a citizen's suit was not intended to be a prerequisite to an award." *Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co.,* 62 F.R.D. 353, 355 (D. Del. 1974).

A third early decision to the same effect was *Citizens Association of Georgetown v. Washington,* 373 F.Supp. 136 (D.D.C. 1974), *reversed on other grounds,* 535 F.2d 1318 (D.C. Cir. 1976). Once again, the plaintiffs were unsuccessful in an effort to prove a violation of Clean Air Act standards. Nevertheless, they were awarded attorneys fees "...because the litigation had furthered the act's purpose of encouraging citizen suits to accelerate enforcement of the Clean Air Act." 672 F.2d at 37.

In *Metropolitan Washington Coalition for Clean Air v. District of Columbia,* 639 F.2d 802 (D.C. Cir. 1981) the District of Columbia Circuit reversed a district court decision refusing to award fees under section 304(d) because the plaintiffs had not prevailed. The Court of Appeals ruled

that the lower court had "incorrectly focused attention on the outcome and practical effects of the litigation, to the exclusion of a more relevant consideration: whether the suit was of the type that Congress intended to encourage when it enacted the citizen-suit provision . . ." 639 F.2d at 804. The court concluded that Congress intended fees to be awarded "whenever the underlying suit was a prudent and desirable effort to achieve an unfulfilled objection of the Act." *Ibid.*[1]

The most recent judicial pronouncement on this subject is *Northern Plains Resource Council v. EPA*, ... F.2d ...., 17 E.R.C. 1343 (9th Cir. No. 79-7618, March 1, 1982). There, the Ninth Circuit awarded fees to a losing party under section 307(f) of the Clean Air Act. The court found the issue so unremarkable that its discussion of the propiety of the award was restricted to three short paragraphs. It concluded:

> We agreed with the D.C. Circuit that in determining whether a party—prevailing or non-prevailing—can recover attorney's fees under section 307(f) from the government, the test is "whether in the light of what was known . . . when the action was instituted, the action was of the type Congress sought to encourage when it authorized awards of attorney's fees." 17 E.R.C. at 1344, quoting *Metropolitan Washington Coalition for Clean Air v. District of Columbia, supra*, 639 F.2d 802, 804.

CONCLUSION

The decision of the court below is fully supported by the statutory language, the legislative history, and a substan-

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1. See also *Northslope Borough v. Andrus*, 515 F.Supp. 961 (D.D.C. 1981) (appeal pending), awarding fees to unsuccessful plaintiffs on the basis of "appropriate" fee authorizations in the Endangered Species Act, 16 U.S.C. § 1640(g)(4) and Outer Continental Shelfs Land Act, 43 U.S.C. § 1349(a)(5).

tial body of judicial precedent. Confronted with all these authorities, the government resorts to a twisted reading of the statute and a narrow, crabbed interpretation of the cases to bolster its point of view. Its basic contention, stripped of its flimsy legal justification, is that awarding fees to non-prevailing parties is not a good idea. As this court has so often noted, such an argument should be made to Congress, not the courts.

This court should not take seriously the government's assertion that the decision below "threatens to impose substantial burdens on the federal courts, administrative agencies and the Justice Department by encouraging unproductive, expensive and time-consuming litigation." (Petition, p. 8). Fears that the decision will open a "floodgate" of litigation under the Clean Air Act and other statutes which provide for fees in "appropriate" cases is unfounded. Potential litigants are still faced by substantial expenses and risks even if fees might be available if they lose. First, as the court below noted, litigants are *not* entitled to fees for the substantial effort that must be put in to the administrative proceedings which precede the appeal. 672 F.2d at 42. In this case, for example, the Sierra Club devoted at least 721 hours to administrative proceedings leading up to the litigation, far more time than was spent on compensable judicial litigation. See Sierra Club's Amended Request for Attorneys Fees, October 13, 1981. Second, a fee award is by no means assured even for judicial litigation. The court below noted that fees will be awarded to non-prevailing parties only in "exceptional" circumstances. 672 F.2d at 39.

Thus, contrary to the government's insinuation, the decision below will not cause a rush to the courthouse by litigous lawyers and clients. The substantial expenses and

uncertainties connected with major litigation under the Clean Air Act will remain to deter all but the most consequential and important lawsuits. Those are precisely the kinds of suits that Congress intended to promote under § 307(f). The petition for a writ of certiorari should be denied.

September 13, 1982

Respectfully submitted,

JOSEPH J. BRECHER
Attorney for the Sierra Club

Appendix A

Stenographic Transcript Of

HEARINGS

Before The

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

MARK-UP SESSION

THE CLEAN AIR ACT

August 19, 1982

WASHINGTON, D.C.

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Senator Simpson. Mr. Chairman, I do appreciate very much coming to this point where I have three remaining amendments and hopefully, they can be disposed to today.

The first two were the ones with regard to attorney's fees. I think I explained that rather clearly the other day. We had in the Act two places where a court may award the costs of litigation, including attorney's fees "Whenever it determines that such an award is appropriate."

May we have order, Mr. Chairman?

Senator Stafford. Yes. The Chair would ask that the committee and especially our guests will kindly refrain from audible conversations. The Senator is making an important statement about an important amendment. The Chair would dislike to have to ask any of our guests to leave, but we do want order so the Senator's amendment can be heard and the statement in support of it.

Senator Simpson. Thank you.

The present language simply states that "Those fees may be awarded whenever it is determined that such an award is is appropriate." The purpose of the amendment, because of what has occurred recently in the District of Columbia Circuit where we have seen the award of attorney's fees to parties who have sued the government and lost on all counts, my amendment would simply restrict such awards for attorney's fees to "prevailing or substantially prevailing" parties, which is a limitation which is most commonly used in almost every other statute; many, many statutes in my research where I found that we had some 110 different statutes and 97 of them were limited in the manner in which I suggest.

I think it is just too much to ask the taxpayers to pay the expenses of someone who sues the government and loses at every step of the proceedings. That is the purpose of my amendment.

Senator Stafford. Is there discussion of this amendment?

Senator Baucus. Mr. Chairman.

Senator Baucus. Mr. Chairman, I want to thank the Senator from Wyoming for offering this amendment. I have offered the same kind of amendment in other cases, in tax cases and also other cases in either Tax Court or Federal District Court, where taxpayers who are suing are on the receiving end of the suite from Uncle Sam and where they prevail and were awarded attorney's fees, too. We thought that provision was gone. I thank the Senator from Wyoming for performing the same service here.

Senator Simpson. I thank the Chairman.

Senator Domenici. Could I ask the Senator from Wyoming, I know that the statutes are not consistent or homogeneous on attorney's fees. I support your amendment, but I wonder, will this be the single test for environmental lawsuits, or are there other statutes that they might impose on court as providing a different standard from whence they would be entitled? If so, should we not say this is the only quality of measuring attorney's fees and make it absolutely clear? Are you certain that it will be this and no other test?

Senator Simpson. I think in my research, Pete, I found 110 different statutes allowing the awarding of attorney's fees. There are 13 statutes, admittedly principally involved with environmental matters, but not all, who discuss this term "awards as appropriate."

(10:55 a.m.)

Senator Simpson. There are environmental statutes whereby the award is to the prevailing parties or substantially prevailing. 97 out of those statutes limit the awards to prevailing parties or in some way restrict the award.

Senator Domenici. So you are satisfied that this is going to become the test if it becomes law and they are not going to have another statute to look at to say, "There is another test"?

Senator Simpson. I think this would be the test.

Senator Domenici. For this kind of lawsuit?

Senator Simpson. I think so, certainly under the Clean Air Act, obviously.

Senator Stafford. Is there further discussion? Is there a request for a roll call?

Senator Simpson. No.

Senator Stafford. Hearing none, all those in favor of the amendment will say aye.

(Chorus of ayes.)

Senator Stafford. Those opposed, no.

Senator Stafford. No.

The ayes appear to have it. The ayes do have it. The amendment is adopted.